

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EURO PACIFIC CAPITAL, INC., individually and in its capacity as Investor Representative and attorney-in-fact for ALEXANDER AND YANA GALUZ, AMY J. STEFANIK, ANN STRUVE, ANTHONY NAHUM, ART KLEPPEN AND KIMBERLY KLEPPEN, BARBARA ELLIS, BARBARA HEARST, BARBARA S. MEISTER, BENJAMIN R. EARL AND JONEE D. EARL, BERT JUDE HUNTSINGER, BLAKE AND LISA EVERETT, BRUCE FRANKLIN, BRUCE RAVENEL, BURT YANO AND PATRICIA YANO, CAROL COOPER, CAROLYN R. LONG, CHARLES BRABENAC, CHARLES M. CLAUSSEN AND MICHELLE S. CLAUSSEN, CHARLES SULLIVAN AND CAROL SULLIVAN, CHARLOTTE J. BELASCO, CHIN HSIAO, CINDY J. LEWIS, CLIFF WARD, COREY SHANNON MCNAMEE, CURTIS ANDREW BEESON AND BRENDA BATENBURG, CYNTHIA KESSLER AND JAMES KESSLER, DAMON SUTER AND MALINDA SUTER, DANIEL J. GRIFFIN, DARREL LEE KLOECKNER, DAVID ALAN SCULLY, DAVID W. LARSON AND JENNIFER L. LARSON, DEBORAH FOREMAN, DENNIS FRIED AND JOYCE FRIED, DIANE D. SPOLUM, DONALD GIRARD CLARK JR. AND DEBRA L. CLARK, DONALD T. GLASER JR., DOUGLAS W. JOHNSON, EDGAR SIMONS, EDWARD CHARLES MOHR, ELIZABETH RICHARDS, ELMIRA GADOL, FRANCIS BRENT MAY AND JONEITA JEAN MAY, FRANK CARDILE SR., FRED HARPER, GARY LEE BUKAMIER, GARY MARDER, GAYLE M. AND DEBORAH SANDERS, GEORGE FELDMAN, GEORGE K. CHING, GEORGE MADARAZ, GERALD AND BEVERLY R BARNE, GERALD MONA, GERARD SURERUS, GERSHOM LUNDBERG, GILBERT DOMINGUEZ, KENNETH RAY GLEASON, HARNEK THIARA AND TALWINDER THIARA, HEIDI W. KIENE AND KEVIN KIENE, HENRY LOUIS SCHAIRER JR., HOWARD W. WAHL, J. MARK MCPHERSON, JACK AND TAMI FINEGOLD, JACK ABRAMS AND MARGO ABRAMS, JAMES A. SHEAHAN AND MELODY K. SHEAHAN, JAMES A. TAMBORELLO, JAMES ALLEN LUTTER, JAMES CURTIS BROWN, JAMES D. DREYER JR., JAMES V. BACON, JASON HANDZA AND

Index No. 1:15-cv-04636-CM

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
DEFAULT JUDGMENT**

ALEXANDRA HANDZA, JASON L. RAWLINGS AND
LEANNE K. RAWLINGS, JEFF ARCHIBALD,
JEFFREY REISNER, JOANNE COLTRIN AND
ANDRE COLTRIN, JOHN MAVAR, JOHN T. KEALY
AND JANINE K. KEALY, JONATHAN EDWARDS
AND VIRGINIA C. ADAMS, JOSEPH MCCARTHY
AND MIKI MCCARTHY, JOSH D. BRADBURY, JR.,
SUSAN BRADBURY, JOSHUA SCHEIN, JULIA L.
GRIFFIN, JUSTIN KERENYI, KARL K. SPIELMAN
AND MELINDA G. ELKIN, KENNETH NASS, KENT
SCOTT AND LAURA SCOTT, KERRY LEE AND
HELEN WELSH, KEVIN P. O'NEILL AND SUZANNE
ODELL O'NEILL, KURT SWOGGER, LARRY
BRUNZLICK, LARRY E. GROFF AND DORIS R.
GROFF, LARRY GUAGLIARDO, LAURA D.
MCHUGH, LAWRENCE J. BUTZ, LAWRENCE
LEARY, LLOYD E. HENDRIX, LOUIS A. LARSON
AND PAMELA J. LARSON, MARC KASSIN, MARC
W. LEVIN, MARK A. OSTERHAUS, MARK DUGGER,
MARK R. MITCHELL, MARSHALL CARL RICE,
MARY HEINKING, MARY NEIBERG, MARYANN
MIGAS, MATT HAYDEN, MATTHEW C. AMERMAN
AND CARRIE AMERMAN, MEHRAN TASLIMI,
MICHAEL MATULA, MICHAEL SCULLY, MICHELLE
GRIFFIN, MIRIAM SCHWARTZ, MITCHELL MARTIN
AND DEBORAH MARTIN, NANCY L. BENSON,
NICOLAS KARAMAOUN, OLEKSANDR TUMKO
AND OKSANA TUMKO, PAMELA HARRINGTON
MUNRO, PAT BROWNE, PATRICK AND GLORIA
KIRK, PATRICK MULLEN, PAUL DIPAOLO AND
NANCY L. WORTHINGTON, PAUL E. SORGE JR.,
PAUL HARPER ZINK, PETER D. SCHIFF, PETER
SCHORTMANN AND SUSAN SCHORTMANN,
QUINCY MURPHY, RALPH DALE EDSON,
RANDELL SCOTT GLEASON AND MICHELE LEE
GLEASON, RICHARD MOORE, RICHARD P.
ANTHONY III AND KIMBERLY J. ANTHONY,
RICHARD POTAPCHUK, ROBERT DAGGETT,

ROBERT E. CATHRO, ROBERT HEIMANN,
ROBERT L. BISHOP AND FRANCINE BISHOP,
ROBERT NEAL SPADY AND LINDA SPADY,
ROBERT T. FOSS AND MARGARET FOSS, ROD
MCINTYRE, ROYCE V. JACKSON, RUSSELL B.
WALKER, RUSSELL PARKER, SARAH J. BASLER
AND DONALD S. BASLER, SCOTT MUELLER,
SCOTT R. GRIFFIN, SCOTT R. LENNES, SHERRY
MORSE MACCABEE AND JOHN GREENBERGER
MACCABEE, SHIDAN TASLIMI, STANLEY J.
DRELICK, STEPHEN P. MCCARRON, STEPHEN
RASKIN, STEVE SMITH, STEVEN PAUL HARMS,
TERRY ALAN CREWS, TERRY OLSON AND LINDA
M. OLSON, THOMAS AARON LADNER, TIMOTHY
CARROLL, TIMOTHY CRANE, TIMOTHY NASS,
TIMOTHY WEAVER, TINA C. PETERSON AND
HENDRIKUS M. SCHRAVEN, TODD A. HANNON
AND MICHELLE L. HANNON, TONY BIZ AND
JEANNE C. LIM, VADA NOBLES, VINCE BACOLINI,
VIVEK GHAI, VLAJKO DJORDJEVIC, WALTER
FRIESEN, WILLIAM BRADLEY, WILLIAM J. CYR,
WILLIAM WILEY AND MARIANNE WILEY, WILLIS
DUNKUM III, YADIN ROZOV, and DOES 1-100,

Plaintiffs,

vs.

U.S. CHINA MINING GROUP, INC. and HONGWEN
LI,

Defendants.

Plaintiff Euro Pacific Capital, Inc. ("Plaintiff" or "Euro Pacific"), individually
and in its capacity as Investor Representative and attorney-in-fact for Alexander and
Yana Galuz, Amy J. Stefanik, Ann Struve, Anthony Nahum, Art Kleppen and Kimberly
Kleppen, Barbara Ellis, Barbara Hearst, Barbara S. Meister, Benjamin R. Earl and
Jonee D. Earl, Bert Jude Huntsinger, Blake and Lisa Everett, Bruce Franklin, Bruce
Ravenel, Burt Yano and Patricia Yano, Carol Cooper, Carolyn R. Long, Charles

Brabenac, Charles M. Claussen and Michelle S. Claussen, Charles Sullivan and Carol Sullivan, Charlotte J. Belasco, Chin Hsiao, Cindy J. Lewis, Cliff Ward, Corey Shannon McNamee, Curtis Andrew Beeson and Brenda Batenburg, Cynthia Kessler and James Kessler, Damon Suter and Malinda Suter, Daniel J. Griffin, Darrel Lee Kloeckner, David Alan Scully, David W. Larson and Jennifer L. Larson, Deborah Foreman, Dennis Fried and Joyce Fried, Diane D. Spolum, Donald Girard Clark Jr. and Debra L. Clark, Donald T. Glaser Jr., Douglas W. Johnson, Edgar Simons, Edward Charles Mohr, Elizabeth Richards, Elmira Gadol, Francis Brent May and Joneita Jean May, Frank Cardile Sr., Fred Harper, Gary Lee Bukamier, Gary Marder, Gayle M. and Deborah Sanders, George Feldman, George K. Ching, George Madaraz, Gerald and Beverly R Barne, Gerald Mona, Gerard Surerus, Gershom Lundberg, Gilbert Dominguez, Kenneth Ray Gleason, Harnek Thiara and Talwinder Thiara, Heidi W. Kiene and Kevin Kiene, Henry Louis Schairer Jr., Howard W. Wahl, J. Mark Mcpherson, Jack and Tami Finegold, Jack Abrams and Margo Abrams, James A. Sheahan and Melody K. Sheahan, James A. Tamborello, James Allen Lutter, James Curtis Brown, James D. Dreyer Jr., James V. Bacon, Jason Handza and Alexandra Handza, Jason L. Rawlings and Leanne K. Rawlings, Jeff Archibald, Jeffrey Reisner, Joanne Coltrin and Andre Coltrin, John Mavar, John T. Kealy and Janine K. Kealy, Jonathan Edwards and Virginia C. Adams, Joseph Mccarthy and Miki Mccarthy, Josh D. Bradbury, Jr., Susan Bradbury, Joshua Schein, Julia L. Griffin, Justin Kerenyi, Karl K. Spielman and Melinda G. Elkin, Kenneth Nass, Kent Scott and Laura Scott, Kerry Lee and Helen Welsh, Kevin P. O'Neill and Suzanne Odell O'Neill, Kurt Swogger, Larry Brunzlick, Larry E. Groff and Doris R. Groff, Larry Guagliardo, Laura D. Mchugh, Lawrence J. Butz, Lawrence Leary, Lloyd E.

Hendrix, Louis A. Larson and Pamela J. Larson, Marc Kassin, Marc W. Levin, Mark A. Osterhaus, Mark Dugger, Mark R. Mitchell, Marshall Carl Rice, Mary Heinking, Mary Neiberg, Maryann Migas, Matt Hayden, Matthew C. Amerman and Carrie Amerman, Mehran Taslimi, Michael Matula, Michael Scully, Michelle Griffin, Miriam Schwartz, Mitchell Martin and Deborah Martin, Nancy L. Benson, Nicolas Karamaoun, Oleksandr Tumko and Oksana Tumko, Pamela Harrington Munro, Pat Browne, Patrick and Gloria Kirk, Patrick Mullen, Paul Dipaolo and Nancy L. Worthington, Paul E. Sorge Jr., Paul Harper Zink, Peter D. Schiff, Peter Schortmann and Susan Schortmann, Quincy Murphy, Ralph Dale Edson, Randell Scott Gleason and Michele Lee Gleason, Richard Moore, Richard P. Anthony III and Kimberly J. Anthony, Richard Potapchuk, Robert Daggett, Robert E. Cathro, Robert Heimann, Robert L. Bishop and Francine Bishop, Robert Neal Spady and Linda Spady, Robert T. Foss and Margaret Foss, Rod McIntyre, Royce V. Jackson, Russell B. Walker, Russell Parker, Sarah J. Basler and Donald S. Basler, Scott Mueller, Scott R. Griffin, Scott R. Lennes, Sherry Morse Maccabee and John Greenberger Maccabee, Shidan Taslimi, Stanley J. Drelick, Stephen P. Mccarron, Stephen Raskin, Steve Smith, Steven Paul Harms, Terry Alan Crews, Terry Olson and Linda M. Olson, Thomas Aaron Ladner, Timothy Carroll, Timothy Crane, Timothy Nass, Timothy Weaver, Tina C. Peterson and Hendrikus M. Schraven, Todd A. Hannon and Michelle L. Hannon, Tony Biz and Jeanne C. Lim, Vada Nobles, Vince Bacolini, Vivek Ghai, Vlajko Djordjevic, Walter Friesen, William Bradley, William J. Cyr, William Wiley and Marianne Wiley, Willis Dunkum III, Yadin Rozov, and their assignees (collectively, the "Shareholders"), by and through its undersigned counsel, submit this Memorandum of Law in support of their Motion for Default Judgment made pursuant to Rule 55(b) of

the Federal Rules of Civil Procedure. Pursuant to Fed. R. Civ. P. 55(a), this Court entered the default of the Defendants U.S. China Mining Group, Inc. (“USCM”) and Hongwen Li (“Li”) (collectively, “Defendants”) on September 11, 2015. As such, this memorandum is submitted in support of Plaintiff’s Motion for Default Judgment whereby the Plaintiff seeks recovery of damages and costs.

FACTS

China Mining was incorporated in the State of Nevada in 2001. On or about January 7, 2011, the Shareholders entered into a Securities Purchase Agreement (“SPA”) whereby the Shareholders purchased an aggregate of 3,750,000 units of the Company at a purchase price of \$4.00 per unit for payment of an aggregate purchase price of \$15,000,000. Each unit consisted of shares of (i) one share of our common stock, par value \$0.001 per share, and (ii) a five-year warrant (the “Investor Warrant”) to purchase 0.5 shares of our common stock at an exercise price of \$6.80 per share. Under the SPA, Euro Pacific is the “Investor Representative” and “Placement Agent” of all Shareholders and is their lawful agent and attorney-in-fact to act on their behalf.

China Mining failed to file its 10-Q by the August 30, 2014 deadline, and has yet to file or make available its 10-Q for the quarter ending June 30, 2014. The last 10-K or 10-Q China Mining filed was its 10-Q for the period ending March 31, 2014, which it filed on May 20, 2014. Since then, China Mining has refused to provide any reports either publically, to Euro Pacific, or to the Shareholders. This failure to file with the SEC is in blatant breach of the SPA. As a result of China Mining “going dark,” the Shareholders are deprived of a market to sell their investment, as any decision to buy, sell, or hold by all market participants is rendered impossible.

Furthermore, Mr. Li has misappropriated the funds given to USCM in violation of their covenant relating to the use of the proceeds from the sale of securities under the SPA and has made material misrepresentations and omissions of material facts in various transaction documents relating to the SPA, including the SPA itself. In fact, Mr. Li misappropriated two million eight hundred thousand dollars (\$2,800,000) of the SPA proceeds by way of a direct payment to himself shortly after conclusion of the offering. Mr. Li used these funds for his own personal benefit and person financial obligations, including payment of gambling debts. Lastly, USCM has made an illegal and fraudulent investment in a company called Majestic Machinery, Inc. ("Majestic"). Shortly after Mr. Li's misappropriation of the \$2,800,000, China Mining took out a bank loan in the amount of \$3,000,000 for purposes of providing those funds to Majestic; Majestic does not appear to have any credible nexus to coal mining or brokering activities. China Mining has failed to detail or otherwise disclose this transaction in its subsequent 10-Ks and 10-Qs, and upon information and belief, this transaction has brought no return on investment.

ARGUMENT

Plaintiff is entitled to a default judgment based on the well-pleaded allegations of its Complaint. *Greyhound Exhibit Group, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992) (finding that a party's default constitutes a concession of all the well-pleaded allegations of liability). Upon the entry of default, the factual allegations of the complaint, except those relating to the amount of damages will be taken as true. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69 (2d Cir.

1971); *Chen v. Jenna Lane, Inc.*, 30 F.Supp.2d 622, 623 (S.D.N.Y. 1998); and 10 *Moore's Federal Practice* §55.12[1] (3d Ed. 2002).

The default established Defendants' liability to Plaintiff for breach of contract, breach of covenant, breach of covenant of good faith and fair dealing, fraud, fraudulent inducement, and a violation of section 10(b) of the Exchange Act. The default further established Defendant Li's liability for a violation of Section 20(A) of the Exchange Act and breach of fiduciary duty. Accordingly, it is established that Defendants fraudulently induced the Plaintiff to enter into a Securities Purchase Agreement (the "SPA") with intent to eventually "go dark" and abscond with the funds back to China, as described in the Complaint, attached as Exhibit 1 to the Affirmation of Christopher L. Ayers ("Ayers Aff.") filed herewith. See Complaint at ¶¶ 15-46. These facts constitute Defendants' liability. See *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992) ("a party's default is deemed to constitute a concession of all well pleaded allegations of liability"); see also *NCM Contr. Grp. LP v. Asset Recovery Grp. LLC*, No. 11-cv-1753, 2014 U.S. Dist. LEXIS 75119 (D. Conn. June 3, 2014) ("the factual allegations of the complaint, except those relating to the amount of damages, must be taken as true").

Defendants have not appeared in this action. USCM is a publicly held corporation organized and incorporated under the laws of Nevada, which operates out of the People's Republic of China and is headquartered in Tampa, Florida. See Ayers Aff., at ¶ 7. As such, USCM is not an infant or incompetent person, nor can it be in active military service. Li is the President and Chief Executive Officer of USCM. See Ayers Aff., at ¶ 8. As such, Li is not an infant or incompetent person, nor is he on active

military service. Therefore, Plaintiff seeks a judgment in an amount not less than \$15,000,000 plus punitive damages, costs, attorneys' fees and interest in the amount of nine percent per year. Plaintiff further seeks a judgment whereby the Shareholders can "put" their shares at fair market value as a result of USCM's breach of the SPA and for the Court to impose a mandatory injunction, requiring USCM to report under the Exchange Act pursuant to the SPA. Additionally, Plaintiff seeks to award Euro Pacific, individually, an amount not less than \$1,000,000 to compensate Plaintiff for the loss of business and reputational harm suffered as a result of Defendants' misconduct, plus interest.

CONCLUSION

Plaintiff respectfully requests that this Court grant the Motion for Default Judgment against Defendants on all counts of the Complaint, as follows:

1. Order China Mining to provide Euro Pacific, individually and in its capacity as Investor Representative and attorney-in-fact for the Shareholders, with copies of the books and records for inspection in New York;
2. Award Euro Pacific, in its capacity as Investor Representative and attorney-in-fact for the Shareholders, an option to "put" their shares in China Mining at fair market value, to be determined by the Court at an inquest hearing following the submission of Plaintiff's proofs of claim;
3. Grant a mandatory injunction requiring China Mining to report under the Exchange Act pursuant to the SPA;
4. Order Defendants to prepare an accounting of all profits earned as a result of their misappropriation of SPA offering proceeds;

5. Award Euro Pacific, individually, damages of at least \$1,000,000.00 to compensate Plaintiff for all their business losses and reputational damages, plus interest, to be determined by the Court at an inquest hearing following the submission of Plaintiff's proofs of claim;

6. Award compensatory damages in favor of Euro Pacific, individually and in its capacity as Investor Representative and attorney-in-fact for the Shareholders, against Mr. Li in an amount sufficient to compensate Plaintiff for all losses and damages, plus interest, to be determined by the Court at an inquest hearing following the submission of Plaintiff's proofs of claim;

7. Award Euro Pacific, individually and in its capacity as Investor Representative and attorney-in-fact for the Shareholders, punitive damages against Defendants, in an amount to be determined by the Court at an inquest hearing following the submission of Plaintiff's proofs of claim;

8. Award of Euro Pacific, individually and in its capacity as Investor Representative and attorney-in-fact for the Shareholders, attorneys' fees and costs of suit incurred herein, in an amount to be determined by the Court at an inquest hearing following the submission of Plaintiff's proofs of claim; and

9. Award Euro Pacific, individually and in its capacity as Investor Representative and attorney-in-fact for the Shareholders, such other and further relief as this Court deems just and proper.

Dated: November 12, 2015

ANDERSON KILL P.C.

By: /s/ Christopher L. Ayers
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